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Supreme Court of the United States

No. 818 OCTOBER TERM, 1943.

THE CITY OF NEW YORK,

Petitioner,

against

THE NATIONAL CITY BANK OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

to the

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

March 24, 1944.

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Supreme Court of the United States

No. ..... October Term, 1943.

The City of New York,

Petitioner,

against

The National City Bank of New York.

PETITION FOR WRIT OF CERTIORARI

to the

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of the City of New York respectfully shows:

1. Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

2. In a certain condemnation proceeding in the United States District Court for the Eastern District of New York, entitled *United States of America* v. 53¼ *acres of Land, etc.*, the United States, as petitioner, filed a notice and petition in condemnation and a declaration of taking on April 1, 1941, pursuant to tit. 40, U. S. Code, §258a, to acquire fee title to certain lands in the Borough of Brooklyn owned by the City of New York, known as Wallabout Market, and simul-

taneously deposited in the Registry of the District Court the sum of $4,000,000, as the estimated just compensation for the land taken. In accordance with the provisions of the statute, fee title to the property vested in the United States on April 1, 1941.

3. Included in the land thus acquired was a parcel designated as Damage Parcel No. 55, which, on May 1, 1939, had been leased by the City to Nathan and Alexander Hudes, for a term of ten years (R. 6-7). The tenant was required to pay monthly, in advance, a rental of $20.63 (R. 16). The lease also provided that failure to pay rent when due should result in a termination of the lease and give the lessor the right to re-enter (R. 16). The tenant executed and delivered to the respondent, The National City Bank of New York, a mortgage of the leasehold (R. 7).

4. The tenant defaulted in the payment of rent for the months of February to September, 1940, inclusive (R. 17). The City then instituted summary proceedings, which resulted in a final order awarding possession to it on November 8, 1940. The lease was thereby terminated (New York Civil Practice Act, §1434). The warrant of removal was executed on November 25, 1940 (R. 17).

5. On September 24, 1941, almost six months after fee title to the premises had vested in the United States, the attorneys for the respondent served upon the Corporation Counsel a notice of intention to redeem in purported compliance with New York Civil Practice Act, §1438 (R. 9-10, 19). On November 25, 1941, the respondent tendered to the Commissioner of Markets the sum of $508.41, alleged to represent the total rent in arrear, with interest thereon, together with costs and disbursements incurred by the City in the summary proceedings, plus taxes and water rates

with interest and penalties (R. 10). The tender was refused (R. 10).

6. On February 13, 1942, the respondent made a motion in the condemnation proceeding (a) for permission to deposit with the District Court Clerk to the credit of the City the sum of $508.41, representing the tender theretofore made; (b) in the alternative, that an equal sum be deducted from the advance payment applied for; and (c) for an order directing the Clerk to allocate to it out of the $4,000,000 deposit a sum of money representing a fair, just and reasonable payment on account of the just compensation to be awarded to it in the proceeding (R. 3-4). The motion was opposed by the City upon the ground that the respondent had no compensable interest in the property taken (R. 20). The District Court denied the motion (R. 36-38).

7. On December 9, 1943, the Circuit Court of Appeals reversed the order of the District Court (139 F. [2d] 244) and remanded the cause for further proceedings to determine the just compensation due to the respondent.

Jurisdiction and Timeliness.

8. This petition is submitted under U. S. Code, tit. 28, §347, subd. (a), and the Court has jurisdiction to grant the writ.

9. Since the decision of the Circuit Court of Appeals was handed down on December 9, 1943, and the order of affirmance was entered on December 30, 1943, the petition is timely.

10. The record remains in the custody of the Clerk of the United States Circuit Court of Appeals.

Statutes Involved.

11. New York Civil Practice Act, §§1437, 1438, 1439 and 1440 are printed in the Appendix, *post*, pp. 30-32. The condemnation proceeding was instituted under tit. 40, U. S. Code, §258a.

The Opinions Below.

12. The opinion of the District Court (ABRUZZO, D.J.) is reported in 48 F. Supp. 764 and is printed at pages 29-36 of the Record. The District Court held that the mortgagee of a leasehold is required by New York Civil Practice Act, §1440 (*post*, p. 32) to follow the tender with an application for an order establishing the act of redemption. The Court found that the respondent had failed to comply with the requirements of the statute and that such failure deprived it of the right to an award (R. 33-36). Though the City's contention that the right to redeem was not compensable was mentioned by the District Court (R. 35), that contention was not passed upon.

13. The opinion of the Circuit Court of Appeals is reported in 139 F. (2d) 244, and is printed at pages 49-54 of the Record. Judge SWAN, with whom Judge L. HAND and Judge FRANK concurred, held that the respondent's failure to comply with §1440 of the Civil Practice Act was not determinative of its right to compensation. Holding that the respondent's inchoate statutory right to redeem was compensable, the Circuit Court said (R. 52):

> "We see no reason to grope about in the mysterious world of 'estates' and 'interests not estates'. The law of New York has put the matter on a very practical basis: a right with respect to property

> taken in condemnation may be so remote or incapable of valuation that it will be disregarded in awarding compensation; otherwise it will not be disregarded."

The Circuit Court referred to several New York cases involving rights of reverter and re-entry, dower, and rights to renew leases (R. 52-53). The Court then said (R. 53):

> "In the light of these cases we think that the right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an 'estate' or 'interest' in the land."

The Court also said (R. 53):

> "There was enough likelihood of redemption by the Bank to give its right value, and that, we think, should be the test of its compensability."

The Court concluded as follows (R. 53-54):

> "Its [respondent's] share of the sum awarded for the premises should include at least the value of the unexpired term of the lease."

Summary Statement of the Matter Involved.

14. The issue involved is whether an unexercised inchoate statutory right to redeem a lease is an estate or interest in land compensable in this condemnation proceeding. Section 258a, tit. 40, U. S. Code, under which the property was acquired, expressly provides that it applies "In any proceeding * * * for the acquisition of any land or easement or right of way in land * * *." It further provides that the declaration of taking shall contain "A statement of the estate or interest in said lands taken for said public use."

New York Civil Practice Act, §1437 (*post*, p. 30), provides that a lessee whose lease has been terminated by summary proceedings based upon a default in payment of rent, may, at any time within one year after the execution of the warrant of removal, pay or tender to the landlord the rent in arrear and costs. Thereupon, the lessee shall be entitled to possession of the demised premises under the original lease.

Section 1438 of the Civil Practice Act (*post*, pp. 30-32) provides that a mortgagee of a lease may redeem by making a like payment or tender before 2 P. M. on the day following the expiration of one year, provided (a) he has previously filed a notice of intention to redeem, and (b) the lessee has not redeemed in accordance with §1437. Civil Practice Act, §1440 (*post*, p. 32), provides, *inter alia*, that the mortgagee redeeming "succeeds to all the duties and liabilities of the lessee accruing after the redemption as if he was named as lessee in the lease."

On April 1, 1941, when title to Wallabout Market vested in the United States in this proceeding, the lessee had not redeemed, nor had the respondent filed the notice of intention to redeem as provided by §1438 of the Civil Practice Act. Under the latter section, the respondent had only one day upon which it could exercise its right to redeem, *viz.*, November 25, 1941 (a year and a day after execution of the warrant of removal). Consequently, on April 1, 1941, the respondent had only an inchoate statutory right to redeem. Since all interests in the property were extinguished by the Government's acquisition in fee on April 1, 1941, at no time thereafter could respondent redeem pursuant to the statutory provisions so as to succeed to "the duties and liabilities of the lessee."

Your petitioner contends that on April 1, 1941, the respondent had a naked inchoate statutory right to redeem,

unexercisable thereafter, which did not constitute an estate or interest in land; that such statutory right had none of the attributes of property, but was merely a special and limited privilege; that the Circuit Court of Appeals has misinterpreted the New York decisions, under which the test of compensability is not "whether condemnation has deprived the claimant of a valuable right", but whether, as is shown in the subjoined brief, the right is an estate or an interest in land; and that the granting of an award to the respondent deprives your petitioner of just compensation.

Questions Presented.

15. The questions presented are:

(a) Is an unexercised inchoate statutory right to redeem a lease of land compensable when fee title to the land is acquired in a condemnation proceeding?

(b) Did the Circuit Court of Appeals correctly hold that, for the purpose of deciding whether the respondent was entitled to compensation, it was not necessary to determine whether its unexercised inchoate statutory right to redeem the lease was an estate or interest in land?

(c) Did the Circuit Court of Appeals correctly hold, and did it correctly interpret the law of New York as holding, that the right to compensation is to be determined by whether condemnation has deprived the claimant of a valuable right rather than by whether his right is an estate or interest in land?

(d) Did the Circuit Court of Appeals correctly hold that the respondent could and did redeem the lease after title to the property vested in the United States?

(e) Does the holding of the Circuit Court of Appeals that the respondent is entitled to share in the award have the effect of depriving the City of just compensation for the taking of its land?

Reasons for Allowance of Writ.

16. This case raises an important question of public law which has never been decided by this Court, and which is of vital importance to all parties in condemnation proceedings. The interest of your petitioner in seeking review by this Court, is not merely as the claimant-owner of the property taken in this proceeding, but also as a municipality possessing the power of eminent domain granted by a statute (New York City Charter, §381) which contains provisions substantially identical with the statute under which this proceeding was instituted.

17. Tremendous amounts of public funds are expended annually by governmental agencies in the acquisition of land for public use. It is common knowledge that plans are already in existence entailing the outlay of billions of dollars during the post-war period for public works, involving the condemnation of vast areas of land. The effect of the decision below is to make compensable in a proceeding restricted to the acquisition of real property a right which has never been considered as property or as an estate or interest in land. If the decision is permitted to stand, and the test of compensability enunciated therein is followed, awards will be made for rights and privileges which are not property or estates or interests in land.

18. By its decision, the Circuit Court of Appeals has deprived your petitioner of just compensation in this pro-

ceeding in that any award made to the respondent will necessarily be carved out of the award for the taking of your petitioner's land. In holding that the respondent's right to redeem is compensable, and that it is entitled to the value of the unexpired term of the lease, the Circuit Court of Appeals has disregarded and misinterpreted applicable decisions of the New York Courts which determine what rights are compensable in a condemnation proceeding.

19. The decision below tends to contravene applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this case, being No. 54 on its calendar for the October Term, 1943, to the end that the case may be reviewed and determined in this Court, as provided in Title 28, §347 of the Code of Laws of the United States, and that the said order of reversal of the said Circuit Court of Appeals for the Second Circuit in this case, and every part thereof, may be reviewed by this Court, and the determination of the said Circuit Court of Appeals for the Second Circuit may be reversed and a mandate issued denying in all respects the prayer for relief of The National City Bank of New York and dismissing its petition for an award; and your petitioner prays for such other and further relief as

to this Court may seem just and equitable; and your petitioner will ever pray.

New York, N. Y., March 24, 1944.

THE CITY OF NEW YORK,
Petitioner,

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Municipal Building,
New York, N. Y.